NO. 42481-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CAITLIN C. MASON,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

F. APPENDIX

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Other Authorities

ASSIGNMENT OF ERROR

Assignment of Error

1. Officer Withrow, who stopped a vehicle for a minor traffic infraction, violated the defendant's right to privacy as the passenger and the driver's right to privacy as the driver when he went to the passenger side of the vehicle to get a better look at the defendant, asked her to identify herself, ran her name for warrants, and then called another officer to the scene in an attempt to verify the defendant's identity.

2. The officers violated the defendant's right to privacy when they searched her purse incident to her arrest because the defendant did not have access to the purse at the time of her arrest or at the time of the search.

3. The officer's search of the defendant's purse cannot be justified as a "pre-booking" inventory in aide of the booking inventory that the officer anticipated the jail would perform.

Issues Pertaining to Assignment of Error

1. Consistent with Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, may a police officer who stops a vehicle for a traffic infraction go to the passenger side of the vehicle to get a better look at the passenger, ask the passenger to identify herself, run the passenger's name for warrants, and then call another officer to the scene in an attempt to verify the passenger's identity simply because the officer is "suspicious" because the passenger won't look at the officer?

2. Consistent with Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when a police officer arrests a passenger in a vehicle on an outstanding warrant, may that officer remove the passenger's purse from the vehicle and search it after putting the defendant in handcuffs and placing her in a patrol vehicle?

3. Consistent with Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, may a police officer justify a search of a defendant's purse as a "pre-booking" inventory in aide of the booking inventory that the officer anticipates the jail will perform?

STATEMENT OF THE CASE

On February 17, 2011, Centralia police Officer Chad Withrow was on routine patrol when he stopped a vehicle for expired license tabs and a defective taillight. RPS 4-5.[1] Upon his initial approach, Officer Withrow noted three occupants in the vehicle: a female driver, a female front seat passenger, and a child in the back seat. RPS 5. As Officer Withrow reviewed the driver's license and told her why he had stopped her, he noted that the defendant looked away and appeared to not want him to see who she was. RPS 5-6. This refusal to look at him made him "highly suspicious," although he had no reason to believe that either the driver or the passenger had committed any sort of crime. RPS 10.

Based upon his "suspicion," Officer Withrow left the driver's side of the vehicle, walked over to the passenger side, and asked the defendant if she was "O.K." RPS 5-6. She responded that she was, but in doing so again looked away from him. RPS 6. Now feeling even more "suspicious," Officer Withrow asked the defendant to identify herself. *Id.* She responded with the last name of Mason but not with her given name of Caitlin, although

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[1]The record on appeal includes two volumes of verbatim reports. The first volume contains the transcript of the suppression motion held on May 5, 2011, referred to herein as "RPS [page d#]." The second volume includes the transcripts of the bench trial held on May 19, 2011, and the sentencing hearing held on August 17, 2011. This volume is referred to herein as "RP [page #]."

he did not know at the time what the defendant's true name was because he was not acquainted with her. *Id.* Officer Withrow then called that name into dispatch to check it for warrants. *Id.* After a short wait, dispatch responded with "nothing found." RPS 7. At this point, Officer Withrow called to have Centralia Officer Patricia Finch respond to the scene to determine whether or not she could identify the defendant. *Id.*

After a few minutes, Officer Finch arrived at the scene of the stop, got out of her vehicle, and approached Officer Withrow and the defendant. RPS 6-7 16-18. As she did so, she looked at the defendant and told Officer Withrow that (1) she recognized the defendant as Caitlin Mason, and (2) that she believed that the defendant had an outstanding warrant. *Id.* Officer Withrow then called in, confirmed the existence of the warrant, walked back over to the passenger side of the vehicle, opened the door, told the defendant that she was under arrest, and ordered her out of the car. RPS 7-8. The defendant, who had a purse on her lap, refused to exit the vehicle. *Id.* At this point, Officer Withrow reached in, took the defendant's purse, put it on the hood of the car, and then reached back into the car and pulled the defendant out. *Id.*

After getting the defendant out of the car, he placed her in handcuffs, and gave her to Officer Finch, who searched the defendant's person and put her into the back of Officer Withrow's patrol car. RPS 7-8. While doing

this, Officer Finch asked the defendant if the purse back on the roof of the suspect vehicle belonged to her. *Id.* The defendant responded that it did. *Id.* At this point, Officer Withrow returned to the suspect vehicle, took possession of the defendant's purse, and then asked the defendant whether or not she wanted them to bring it to the jail with her. *Id.* According to the officers, the defendant, who was now cuffed and secured in the back of a patrol vehicle, responded in the affirmative. RPS 8-9, 19-20. According to the defendant, she responded that she wanted them to leave the purse in the car. RPS 22. Regardless of which version was correct, at this point Officer Withrow handed the purse to Officer Finch, who searched it and found a pill bottle with three hydrocodone pills inside. RPS 8-9, 19-20.

The state later charged the defendant with illegal possession of the three hydrocodone pills. CP 1-3. Following arraignment, the defendant moved to suppress the pills, arguing that the officers had searched her purse without a warrant and without any exception to the warrant requirement. CP 8-10. The court later called the case for a suppression motion, during which Officer Withrow, Officer Finch, and the defendant testified. CP 20; RPS 1-30. Following argument, the court denied the motion, later entering the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.1 On 02-17-11, at approximately 2320hrs, in Lewis County,

Officer Withrow, Centralia PD, was on patrol in the 300 block of W. Main St. when he noticed a vehicle with a defective tail light and expired tabs.

1.2 Withrow stopped the vehicle, contacted the driver and informed her of the reason for the stop.

1.3 Also present inside the vehicle were a female passenger seated in the front and a child in the back seat.

1.4 Withrow noticed the passenger appeared as if she were trying to hide or block her face from view.

1.5 Withrow asked the passenger if she was okay.

1.6 The passenger replied that she was fine but continued to shield her face from view.

1.7 Withrow then asked the passenger if she would mind identifying herself.

1.8 The passenger identified herself with a name other than her own.

1.9 Officer Finch, Centralia PD, arrived and was able to recognize the passenger as Caitlin Cherie Mason.

1.10 Finch was aware of a warrant issued for Mason's arrest.

1.11 Withrow ran Mason's name and discovered she was wanted on an outstanding warrant.

1.12 The warrant was confirmed and Mason was ordered to exit the vehicle.

1.13 While seated in the vehicle, Mason had a purse in her lap.

1.14 Mason refused to exit the car.

1.15 Withrow seized Mason's purse and put it on the roof of the vehicle.

1.16 Withrow then took hold of Mason and escorted her from the vehicle.

1.17 Mason was placed in handcuffs and secured in the rear of Withrow's patrol car.

1.18 Before being put in the rear of Withrow's patrol car, Mason was searched by Officer Finch.

1.19 While she was being searched, Withrow asked Mason if the purse he removed from her belong to her.

1.20 Mason replied that it did.

1.21 Mason was asked whether she wished to have her purse taken with her to the jail.

1.22 Mason replied that she did.

1.23 Finch took custody of Mason's purse and searched it prior to Mason being transported to the jail.

CONCLUSIONS OF LAW

2.1 Officer Withrow was acting either in a community caretaking or investigative role when he asked the defendant to identify herself.

2.2 Officer Withrow had a clearly articulable basis for asking the defendant to identify herself.

2.3 Officer Withrow had a duty to search the defendant's purse prior to transporting and tend[er]ing it to jail personnel.

2.4 The search of the defendant's purse was lawful.

CP 22-24.

The court later called this case for a trial to the bench, the defendant having waived her right to a jury. CP 27. During trial, the state called

Officer Withrow and Officer Finch, who testified consistent with their testimony from the suppression motion. RP 5-28, 29-36. The state also called a forensic scientist who testified that the pills taken from the defendant's purse contained hydrocodone. RP 36-46. After this testimony, the court found the defendant guilty as charged, later sentencing her within the standard range. CP 42-50. The defendant then filed timely notice of appeal. CP 56-65.

ARGUMENT

THE COURT ERRED WHEN IT REFUSED TO SUPPRESS EVIDENCE THE POLICE FOUND AFTER ILLEGALLY DETAINING THE DEFENDANT AND SEARCHING HER PROPERTY IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment warrantless searches are *per se* unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it's burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

In the case at bar, the trial court's findings and conclusions in denial of the defendant's suppression motion reveals that the court believed the officers actions were justified in detaining the defendant because he had "a community caretaking or investigative" purpose and "a clearly articulable

basis" for asking the defendant to identify herself. In addition, the court found that the officer had a "duty to search the defendant's purse prior to transporting and tend[er]ing it to jail personnel." As the following explains, these conclusions were in error.

1. Officer Withrow, Who Stopped a Vehicle for a Minor Traffic Infraction, Violated the Defendant's Right to Privacy as the Passenger and the Driver's Right to Privacy When He Went to the Passenger Side of the Vehicle to Get a Better Look at the Defendant, Asked Her to Identify Herself, Ran Her Name for Warrants, and Then Called Another Officer to the Scene in an Attempt to Verify the Defendant's Identity.

A traffic stop made upon an observation of an infraction committed by the driver or a passenger constitutes a seizure of the occupants of the car, justified only to the extent necessary to investigate the infraction. *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). That legal justification ends at the point the officer strays from the original intent of the stop, or never exists to the extent the officer using the commission of the infraction as a pretext to investigate other criminal activity. *Id.* For example, while processing a traffic infraction, a police officer may not request identification from passengers for investigative purposes unless there is an independent basis that justifies that request. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004).

One independent basis for asking a passenger for identification exists if the officer develops a reasonably articulable suspicion based upon

objective facts that the passenger is involved in criminal activity. *State v. Allen*, 138 Wn.App. 463, 469, 157 P.3d 893 (2007). In order to satisfy that requirement, the officer must be able to identify specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. *State v. Bliss*, 153 Wn.App. 197, 204, 222 P.3d 107 (2009). By contrast, a traffic stop does not become an unlawful seizure simply because the officer inquires into matters unrelated to the justification for the stop, so long as those inquiries "do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 788, 172 L.Ed.2d 694 (2009).

For example, in *State v. Allen*, *supra*, an officer stopped a car for a traffic infraction. The defendant was the front seat passenger. A records check indicated that the driver was the protected person in a no contact order. The officer, however, had no identifying information about the respondent in the protection order. Nevertheless, the officer asked the defendant for identification. Both the defendant and the driver stated that the defendant's name was Ben Haney. When a records check revealed no records for a person by that name, the officer had the driver exit the vehicle so she could again ask for the defendant's identity. After she exited the vehicle, the driver admitted that the defendant was Ryan Allen and that the no contact order had been entered against him.

Once the officer discovered the defendant's true identity, he placed the defendant under arrest for violation of a no contact order. The officer then searched under the passenger seat and found methamphetamine. The state later charged the defendant with possession of these drugs and the defendant moved to suppress, arguing that the officer had violated his right to privacy when he varied from the purpose of the original stop on the traffic infraction and asked the defendant to identify himself. The trial court disagreed and denied the motion to suppress. The defendant later stipulated to facts sufficient to convict and appealed, renewing his argument that the officer illegally detained him by asking him to identify himself.

The state responded on appeal by first arguing that the officer's questioning of the passenger and driver was incidental to the infraction stop and not a violation of the defendant's right to privacy. The Court of Appeals rejected this argument, holding as follows:

> First, it cannot be said that Lowrey's later questioning of Peggy was within the scope of the original traffic violation. The State argues that it was within that scope because Lowrey would have had to return to her to either issue the traffic citation or tell her she was free to go. But this argument stretches logic. Asking Peggy to exit her car, accompany Lowrey to the rear of the vehicle, and ask twice to know the name of the passenger goes well beyond a routine investigation of a traffic violation. This is essentially the fishing expedition that the exclusionary rule seeks to prohibit.

State v. Allen, 138 Wn.App. at 471 (citation omitted).

The state also argued that even if the officer exceeded the scope of a

valid stop for a traffic infraction, her actions were justified because she had a reasonably articulable suspicion based upon objective facts that the defendant was the restrained party in the protection order. However, the Court of Appeals also rejected this argument, holding as follows:

> Second, Lowrey did not have a lawful basis for a reasonable suspicion that the passenger was Allen when he asked Peggy to come to the rear of the vehicle. At this point, Lowrey had a reasonable suspicion because the false name Ben Haney did not register on the CAD databases. But this evidence was derived from Allen's unlawful seizure and inquiry and, therefore, it must be excised from the review of Lowrey's reasonable suspicion. Without knowledge that the passenger provided a false name, Lowrey did not possess reasonable articulable facts to believe that the no-contact order referred to the passenger. For these reasons, the identifying information Lowrey obtained from Peggy does not qualify as a lawful independent source of evidence that gave rise to the probable cause needed to arrest Allen.

State v. Allen, 138 Wn.App. at 471 (footnote omitted).

Based upon these holdings, the Court of Appeals reversed the defendant's conviction and remanded the case to the trial court with instructions to grant the motion to suppress.

The facts in the case at bar are similar to those in *Allen*. In the case at bar a police officer stopped a vehicle solely for the commission of a traffic instruction, as did the officer in *Allen*. In the case at bar, there was no other justification for the initial detention; neither was there in *Allen*. In the case at bar, the officer became "suspicious" because the front seat passenger appeared to not want to look at him. In *Allen*, the officer became suspicious

when he discovered that there was a no contact order with the driver's named as the protected party. However, the fact that the passenger in the case at bar did not want to look at the officer was no more a justification for asking the passenger for identification and then coming over to the passenger side of the vehicle than was the existence of the protection order in *Allen* justification for asking the passenger to identify himself and for taking the driver out of the vehicle.

In fact, the passenger's desire to avoid contact with the officer was no justification at all for the officer to stray from the purpose of the traffic infraction, go to the passenger side of the vehicle, ask the passenger if she was "O.K.", ask the driver to identify herself, run her name for warrants, and then call another officer to the scene. As our court's have repeatedly stated, a passenger in a vehicle stopped for a minor traffic infraction is not under the legal restraint of the police and may leave the scene at will to the point that the passenger may exit the vehicle and run away without giving the officers legal justification to prevent the passenger from leaving.

For example, in *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), two police officers in a patrol car saw a vehicle run a stop sign. The officers pulled behind the vehicle and activated their overhead lights. The vehicle that had committed the infraction then stopped and two juvenile males got out. As the police officers approached, the passenger started to

walk away. As he did, one of the officers ordered him to get back in the vehicle. The passenger then ran away and one of the officers pursued him. That officer eventually caught the passenger and arrested him for obstructing. In a search incident to arrest, the officer found drug paraphernalia on the passenger. The state later charged the passenger with obstructing and possession of drug paraphernalia.

At a combined trial and motion hearing the defendant argued that the evidence seized during the search of his person should be suppressed because he had not committed a crime and his arrest was illegal. The court denied the motion and found him guilty on both counts. On review, the Court of Appeals affirmed, finding that under the decisions in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), ordering the passenger to stay in a vehicle during a stop for a traffic infraction was a *de minimus* intrusion into the passenger's privacy rights and did not violate the Fourth Amendment. The defendant then sought and obtained review by the Washington Supreme Court.

In its analysis, the court declined to review the case solely under the Fourth Amendment. Rather, the court relied upon the enhanced privacy rights available under Washington Constitution, Article 1, § 7. Under this provision the court held as follows:

> Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a *de minimis* intrusion upon the driver's privacy under Art. I, § 7. *See Kennedy*, 107 Wash.2d at 9, 726 P.2d 445.
>
> However, with regard to passengers, we decline to adopt such a bright line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy Art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is *de minimis* in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

State v. Mendez, 137 Wn.2d at 220.

Applying this standard to the facts before it the court in *Mendez* vacated the conviction and remanded the case with instructions to grant the motion to suppress. The court held;

> We hold the trial court erred in finding the stop of Mendez satisfied Terry. We further hold the officers did not meet the objective rationale test under Art. I, § 7 we have articulated in this case that would allow them to order Mendez back into the vehicle. Officer Hartman testified he had no suspicions Mendez had engaged or was about to engage in criminal conduct. Neither officer testified that Mendez's actions in reaching inside his clothing aroused any suspicion. Besides, Mendez did not reach inside his clothing until after he had been seized by Officer Hensley's command to return to the car. "Obviously, once an individual is 'seized,' no subsequent

> events or circumstances can retroactively justify the 'seizure.'" *State v. Stinnett*, 104 Nev. 398, 760 P.2d 124, 126 (1988).

State v. Mendez, 137 Wn.2d at 224.

As the holding from *Mendez* clarifies, in the case at bar the defendant should have been free to get out of the vehicle and walk away or even run away once the officer stopped the driver for committing a traffic infraction. One is then left to ask the question as to how the defendant's refusal to look at the police officer in the case at bar was any more suspicious than getting out of the vehicle and running away was in *Mendez*. The answer to the question is that the defendant's conduct was less suspicious than the defendant's conduct in *Mendez*. It was no more a basis to vary from the purpose of the traffic infraction than it was in *Mendez*. Thus, the officer violated the defendant's rights under Washington Constitution, Article 1, § 7, when he walked over to the passenger side of the vehicle in this case and began interrogating the defendant, when he asked the defendant to identify herself, when he ran her name for warrants, and when he extended the infraction stop even further by calling another officer to come to the scene to attempt to identify the defendant.

2. The Officers Violated the Defendant's Right to Privacy When They Searched Her Purse Incident to Her Arrest Because the Defendant Did Not Have Access to the Purse at the Time of Her Arrest or at the Time of the Search.

In *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), the Washington Supreme Court first addressed the issue whether or not Washington Constitution, Article 1, § 7, provides more protection during vehicle searches than that provided by the Fourth Amendment as applied in *Arizona v. Gant*, 556 U.S.332, 129 S.Ct. 1710, 173 L. Ed. 2d 485 (2009). The following examines the decision in *Patton*.

In *Patton*, a police officer got out of his vehicle and approached the defendant, telling him that he was under arrest on an outstanding warrant. Upon hearing this, the defendant got out of his car and fled into his trailer. Once backup arrived, the officer entered the defendant's home, found him, put him in handcuffs, took him outside and placed him in the back of a patrol vehicle. At this point, the officer searched the defendant's vehicle incident to arrest and found methamphetamine. After being charged, the defendant moved to suppress, arguing that at the time of his arrest, he was not in the vicinity of his vehicle. Thus, the search was not valid under *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). The trial court agreed and suppressed the evidence.

Following dismissal of the drug charge, the state sought review, and

the Court of Appeals reversed, finding that for the purposes of an analysis under *Stroud*, the defendant was "under arrest" at the point that the officer approached him and stated that he was under arrest. Since this happened as the defendant was exiting his car, the search of the vehicle while the defendant was handcuffed and in the back of the patrol vehicle was valid under *Stroud.* The defendant then sought and obtained review before the Washington Supreme Court, arguing that the search was improper under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

During the pendency of the case, the United States Supreme Court issued its decision in *Gant.* The court then reversed the Court of Appeals and reinstated the trial court's order to suppress. However, the court did not base its decision on a conclusion that the police officer had violated the Fourth Amendment as interpreted in *Gant.* Rather, the court based its decision upon Washington Constitution, Article 1, § 7. In so holding, the court followed the rule that "[w]hen a party claims both state and federal constitutional violations, we turn first to our state constitution." *State v. Patton,* 167 Wn.2d at 386 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

In addressing the defendant's claims under Washington Constitution, Article 1, § 7, the court began its analysis by noting the following concerning warrantless searches and exceptions to the warrant requirement.

> Our analysis under article 1, section 7 begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.

State v. Patton, 167 Wn.2d at 386 (citing *State v. Ladson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

The court then reviewed the automobile search exception and "the reasons that brought [it] into existence." The court noted:

> One such exception, and the one at issue here, is the automobile search incident to arrest exception. Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought this exception into existence. *State v. Ringer*, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). (reviewing historical development of search incident to arrest exception under federal and state law). Necessarily, these factors – also described as exigencies – limit the scope of the exception. Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State's burden to establish that it applies. *Parker*, 139 Wn.2d at 496.

State v. Patton, 167 Wn.2d at 386.

At this point, the court undertook a lengthy examination of automobile search exception under *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), under *State v. Stroud, supra*, and under the numerous decisions that subsequently interpreted and expanded *Stroud*. Following this analysis, the court declared the following standard for automobile searches under Washington Constitution, Article 1, § 7:

> Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, ***and that these concerns exist at the time of the search.***

State v. Patton, 167 Wn.2d at 394-395 (emphasis added); *accord State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

A comparison of the standard for analyzing the validity of warrantless vehicle searches under the Fourth Amendment as applied in *Gant* to the standard for analyzing the validity of warrantless vehicle searches under Article 1, § 7, reveals one key distinction. Under the Fourth Amendment as applied in *Gant*, the police may search the vehicle for evidence of the crime for which the defendant is arrested even after the defendant is handcuffed and placed in the back of a patrol vehicle. By contrast, under Article 1, § 7, as applied in *Patton*, once a defendant is handcuffed and placed in the back of a patrol vehicle, that defendant can no longer pose a risk or access evidence in the vehicle to destroy it. Thus, once a defendant is handcuffed and placed in the back of a patrol vehicle, the police may no longer make a warrantless search of the vehicle.

In the case at bar, the undisputed facts as presented by the state in the suppression motion reveal that the officer did not attempt to search the defendant's purse until after the defendant was arrested, handcuffed, and placed in the rear of a patrol vehicle. At that point, he went and retrieved the

purse from the vehicle, although he could have left it on the roof of the vehicle for the driver to put back in the car, or he could have put it back in the vehicle. Actually, he didn't need to take the purse out of the vehicle in the first place since the defendant was not trying to access it when the officer removed her out the passenger side door. Thus, the officer had no concerns that the defendant could access weapons or destroy evidence "at the time of the search." Consequently, the officer's actions violated the defendant's privacy rights under Washington Constitution, Article 1, § 7. As a result, this court should reverse the defendant's conviction and remand with instructions to suppress the evidence the officers found upon their search of the defendant's vehicle.

3. The Search of the Defendant's Purse Cannot Be Justified as a "Pre-Booking" Inventory in Aide of the Booking Inventory the Officers Anticipated the Jail Would Perform.

In the case at bar, the trial court's ruling revealed that it believed that the officer's search of the defendant's purse did not violate the defendant's right to privacy under either Washington Constitution, Article 1, § 7, or United States Constitution, Fourth Amendment, because it was some sort of inventory or "pre-jail booking" search justified by an anticipated imminent booking into jail. In the court's words, the officer had a "duty to search the defendant's purse prior to transporting and tend[er]ing it to jail personnel." As the following sets out at length, this ruling was in error.

One recognized exception to the warrant requirement holds that the police may inventory the items in a defendant's possession at the time of his arrest, including items contained in an impounded automobile in order to protect that property from theft and protect the police from false claims of liability. *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968). The justification for this exception is that an "inventory of property" is part of a community caretaking function for the police, and not a "search for evidence." In *Montague*, the court stated this proposition as follows:

> When ... the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

State v. Montague, 73 Wn.2d at 385.

However, in *Montague*, the court recognized the potential for abuse when the police perform an inventory search as a pretext to find evidence of a crime. In these circumstances, the courts should suppress, even though there was an ostensibly valid reason to inventory. In *Montague*, the court stated as follows on this proposition:

> (n)either would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we

> found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.

State v. Montague, 73 Wn.2d at 385.

One of the factors the courts consider when determining whether or not the police have used an inventory as a pretext to search is the extent the officers have gone to seek lesser intrusive alternatives to the search which would address the needs underlying the inventory while still preserving the defendant's right to privacy. *See i.e. State v. Hill*, *supra* (inventory pursuant to impound absent showing that officer pursued lesser intrusive alternative such as leaving the vehicle or allowing another person to take it violated the defendant's right to privacy); *State v. Hardman*, 17 Wn.App. 910, 914, 567 P.2d 238 (1977) (although police need not exhaust all possible alternatives before impounding vehicle, they must show they "at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle, and then reasonably concluded from [their] deliberation that impoundment was in order."); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980) ("It is unreasonable to impound a citizen's vehicle . . . where a reasonable alternative to impoundment exists.")

One of the reasonable alternatives that the police should explore is to offer to allow the defendant to sign a waiver of liability releasing the police

from any claims arising from a failure to inventory. In *State v. Sweet*, 44 Wn.App. 226, 721 P.2d 560 (1986), another vehicle impound case, the court noted this as a reasonable alternative, unless the defendant is not in a position to execute such a waiver. The court stated as follows on this issue:

> Impoundment as part of the police "community caretaking function" is proper if the vehicle is threatened by theft of its contents and neither the defendant nor acquaintances are available to move the vehicle. In the instant case, officers were unable to arouse Sweet either to ***have him sign a waiver of liability*** or to give alternative instructions for disposition of the vehicle. Officers were able to look through the windows of the truck canopy and observe numerous items of potential value, including tools, in the truck bed. Consequently, even if officers had locked the canopy, the potential for theft remained.

State v. Sweet, 44 Wn.App. at 236 (citations omitted) (emphasis added).

Inventory searches, even when justified, are not unlimited in scope. *State v. Houser*, *supra*. Rather, the permitted extent of an inventory search must be restricted to the purposes that justify their exception to the Fourth Amendment and Washington Constitution, Article 1, § 7. *State v. Dugas*, 109 Wn.App. 592, 37 P.3d 577 (2001). The decision in *Houser* illustrates this limitation.

In *Houser*, the police pulled the defendant over for a minor traffic violation and eventually arrested him for driving while suspended. After the arrest, the officers decided to impound the vehicle and inventory its contents. As part of the inventory search, one of the officers opened the defendant's

trunk and found a shopping bag. Inside that shopping bag, the officer found a shaving kit. Inside the shaving kit, the officer found illegal drugs. The defendant was later convicted of possession of those drugs and appealed, arguing that the trial court had erred when it denied the defendant's motion to suppress that evidence because the search of the grocery bag and the shaving kit exceeded the scope of a valid inventory search. The Washington Supreme Court agreed, stating as follows:

> We conclude that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.

State v. Houser, 95 Wn.2d 143.

In the same manner that the shopping bag in *Houser* presented no indication of dangerousness, so the purse the officer took out of the vehicle in the case at bar presented no indication of dangerousness. Thus, in the same manner that the shopping bag in *Houser* should have been inventoried as a single unit and not opened, so the purse in the case at bar could only be inventoried as a single unit and not opened. Thus, even if the officer in this case was performing a valid inventory search, his action of looking in the purse violated the defendant's right to privacy, regardless of the existence or lack of existence of a departmental policy requiring the search. Indeed, it is hard to understand how the "protocol" or "policy" of a police department,

even if one existed in this case, could be seen to overrule the Washington Supreme Court's decision in *Houser* requiring the police to inventory locked containers as single units unless there is reason to believe that the contents of the container might be dangerous.

Another of the "jealously and carefully drawn" exceptions to the warrant requirement states that jail personnel may make a warrantless inventory search of a person and his or her belongings prior to booking that person into jail. *State v. Smith*, 56 Wn.App. 145, 783 P.2d 145 (1989), *review denied*, 114 Wn.2d 1019, 790 P.2d 640 (1990). This exception arises from the need to assure safety for jail staff and inmates, and to protect the jail from civil claims. *Id.* The justification for this type of search is identical to the justification behind inventory searches performed by police officers. As such, these searches are under the same limitations that the court set in *Houser*. That is to say, to the extent the jail finds a container that gives no indication of dangerous contents, the container must be inventoried as a whole absent the consent of the defendant.

In addition, the claim that the search in this case can be justified as a "jail inventory" is also erroneous because the defendant was not at the jail at the time the officer opened the purse. Neither did he make any claim that he was authorized by the jail to perform their duties for them prior to the jail taking custody of the defendant's person. Thus, in the case at bar, the state

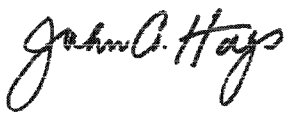
failed to meet its burden of proving a valid exception to the warrant requirement. Consequently, the trial court erred when it denied the defendant's motion to suppress evidence. As a result, this court should reverse the defendant's conviction and remand with instructions to grant the defendant's motion to suppress.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence.

DATED this 27th day of December, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

UNITED STATES CONSTITUTION,
FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**COURT OF APPEALS NO: 42481-9-II**
vs.	**AFFIRMATION OF SERVICE**
Caitlin Cherie Mason, **Appellant.**	

STATE OF WASHINGTON)
) : **ss.**
County of Lewis)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **December 27, 2011** , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

JONATHAN MEYER
LEWIS COUNTY PROS ATTY
345 W. MAIN STREET
CHEHALIS, WA 98532

CAITLIN CHERIE MASON
1008 W. WALNUT STREET
CENTRALIA, WA 98531

Dated this 27TH day of December, 2011 at LONGVIEW, Washington.

/s/

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

HAYS LAW OFFICE

December 27, 2011 - 4:45 PM

Transmittal Letter

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Case Name: State v. Caitlin Mason

Court of Appeals Case Number: 42481-9

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